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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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NO. 1193

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BROWN & ROOT, INC., *Petitioner*

-versus-

AMERICAN HOME ASSURANCE COMPANY,
*Respondent*

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**On Petition for Writ of Certiorari**
**To The United States Court of Appeals**
**For The Fifth Circuit**

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## BRIEF FOR RESPONDENT IN OPPOSITION

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# INDEX


| | Page |
|---|---|
| ARGUMENT | 1 |
| *Argument on Petitioner's First Question* | 2 |
| *Argument on Petitioner's Fourth Question* | 2 |
| *Argument on Petitioner's Second and Third Questions* | 3 |
| CONCLUSION | 6 |
| APPENDIX "A" | 7 |
| APPENDIX "B" | 15 |
| APPENDIX "C" | 16 |


## CITATIONS

### CASES


| | Page |
|---|---|
| Clinton Engines Corp. v. Briggs & Stratton Corp. (E.D. Mich., 1959), 175 F.Supp. 390 | 5 |
| Connelly v. Balkwill (N.D. Ohio, 1959), 174 F. Supp. 49 | 5 |
| Cromwell v. County of Sac (1877), 94 U.S. 351, 24 L.Ed. 195 | 5 |
| Partmar Corp. v. Paramount Theatres Corp. (1954), 347 U.S. 89, 98 L.Ed. 532 | 5 |
| The R. A. Turrentine v. American Home Assurance Co. (5 Cir., 1960), 279 F.2d 811, Cert. Den. 364 U.S. 914, Reh. Den. 264 U.S. 944 | 3, 4, 5 |
| Vanderveer v. Erie Malleable Iron Company (3 Cir., 1956), 238 F.2d 510 | 5 |


### STATUTE


| | |
|---|---|
| The Harter Act, Title 46 U.S.C. A., Sec. 192 | 4, 5 |

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## ARGUMENT

The petition in this matter arising under the general maritime law presents questions for review that are essentially, if not entirely, *factual* in nature and, with all due respect, as such do not merit the attention of this Honorable Court.

## Argument on Petitioner's First Question

Petitioner's first question attempts to dignify the matter of *factual* provability as damages of an $841.57 marine surveyor's fee[1] by asserting that it raises a fundamental question as to the nature of an insurer's right to subrogation. Petitioner contends that because the insurer paid the fee in the first instance, rather than insisting that the insured pay it and claim reimbursement, even such portion of the fee as constituted "expenses . . . reasonably attributable to the action of a prudent uninsured cargo owner in the care, protection, and salvage of the cargo lost or damaged" is not recoverable. Considering the equitable nature of subrogation, we submit that the courts below were patently correct in sustaining recoverability, but if such be thought not to be the case, then it would appear that this question is at least prematurely presented for the reason that, pending the outcome of the remand ordered by the Fifth Circuit, it cannot even be said with certainty that any part of the fee will be found to be recoverable.

## Argument on Petitioner's Fourth Question

Petitioner's fourth question is purely *factual* in character, each of the courts below having twice considered the evidence as to the place where the tortious stranding occurred and each having found the *facts* contrary to petitioner's contentions in this respect and others sufficient to sustain petitioner's liability.

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[1] Judge John R. Brown quite appropriately labeled petitioner's contentions on this question as a "tag-end attack". (Petition of Certiorari, Appendix I, p. 29). Hereafter, citations to the Petition for Certiorari in this case will be made by use of the abbreviation "Pet.", followed by the page number to which reference is made.

## Argument on Petitioner's Second and Third Questions

Petitioner's second and third questions were first carefully considered in a sister case[2] by the late Judge James V. Allred of the Southern District of Texas, later twice[3] by the Fifth Circuit, and still later twice[4] by this Honorable Court. On each occasion the result was adverse to petitioner's contentions. In the case at bar Judge Allen B. Hannay of the Southern District of Texas carefully considered these same questions following the trial on the merits[5] and again upon petition for rehearing.[6] Thereafter, the Fifth Circuit, with the full benefit of all of the decisions cited by petitioner, rendered its Opinion below, carefully reconsidering its former decision in the light of petitioner's authorities, and once again sustaining the previous decision.[7] Thereafter rehearing was again denied.[8]

Petitioner's problems in connection with its second and third questions are manifold, serious and determinative

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[2] **American Home Assurance Company v. Tug R. A. Turrentine, her engines, etc., and Brown & Root, Inc., etc.** (U.S.D.C., S.D. Texas, 1958). Judge Allred's Opinion is set forth at length as Appendix "A" to this brief. This case is sometimes hereinafter referred to as the "Corpus Christi Case", since it was tried in that city.

[3] **The R. A. Turrentine v. American Home Assurance Co.** (5 Cir., June 13, 1960, rehearing denied July 15, 1960) 279 F.2d 811.

[4] Certiorari denied, 364 U.S. 914, 81 S.Ct. 278, rehearing denied, 364 U.S. 944, 81 S.Ct. 463.

[5] Judge Hannay's original Memorandum Opinion filed October 26, 1962, appears at Pet., Appendix II, pp. 31-33 and R. 697-699.

[6] To deal with petitioner's motion for rehearing in the trial court, Judge Hannay filed under date of November 18, 1963, an Amended Memorandum Opinion, which is set forth at length as Appendix "B" to this brief. It also appears at R. 727.

[7] The opinion below is set forth at length at Pet., Appendix I, pp. 21-30

[8] See Pet., Appendix III, p. 34.

against it. First of all, as Judge Allred and the Fifth Circuit found in the Corpus Christi case, and as Judge Hannay and the Fifth Circuit found in the case at bar, the contract involved in this litigation was *as a matter of fact* towage—not carriage or affreightment. For that matter, petitioner in its original answer (R. 19) and in its amended answer (R. 160) to the libel in the case at bar conceded, in fact emphasized, that the engagement was for towage only. Furthermore, the towage contract was oral and did not contain a Harter Act, stranding or similar defense. The witnesses to the making of the contract both testified that the agreement was for towage. See the testimony of Mr. Buyher for respondent on this point (R. 214 ff.) and of Mr. Davis for petitioner (R. 614-615). Furthermore, the Harter Act in terms applies only to carriers—not towers (46 U.S.C.A. Sec. 192).

Secondly, even if a carriage contract were involved (contrary to the evidence, respondent's contentions and the *fact* findings of all of the courts below), neither petitioner nor its tug were parties to any such contract (See the last page of J. Allred's Opinion in the Corpus Christi case (Appendix "A" hereto), Judge Tuttle's concurring opinion in the Fifth Circuit reported in 279 F.2d 811 at 815-816, Judge Hannay's opinion (Pet. 32) and Judge Brown's opinion (Pet. 28) in the Fifth Circuit).

Thirdly, even if, contrary to the foregoing, petitioner and its tug were entitled to the bill of lading defenses, the bill of lading in this case was a short form bill of lading by its terms only incorporating the Uniform Domestic Straight Bill of Lading (essentially a railroad bill of lading) "if this is a rail or rail-water shipment" (See petitioner's Appendix IV and the opinions of the Fifth Circuit, 279 F.2d 811 at 814 and Pet., Appendix I, p. 28). Since no

such shipment was involved here, it is a matter of plain *fact* that the terms of the Uniform Domestic Bill of Lading were not incorporated by reference, the conditions of incorporation not having been met. There is no ambiguity here, as suggested by petitioner.

In addition to the foregoing (any one of which reasons is, we respectfully submit, a sufficient basis for denying petitioner and its tug the Harter Act defenses), in the case at bar there is still another reason why petitioner must fail, namely, that petitioner and its tug are estopped by the judgment in the prior *Corpus Christi case* on these same questions and between these same parties (though the latter case involved a different cause of action). Authorities on this point, among others, are the following:

(1) *Cromwell v. County of Sac* (1877) 94 U.S. 351, 24 L.Ed. 195;
(2) *Partmar Corp. v. Paramount Theatres Corp.* (1954) 347 U.S. 89, 98 L.Ed. 532;
(3) *Vanderveer v. Erie Malleable Iron Company* (3 Cir., 1956) 238 F.2d 510;
(4) *Connelly v. Balkwill* (N.D. Ohio, 1959) 174 F.Supp. 49; and
(5) *Clinton Engines Corp. v. Briggs & Stratton Corp.* (E.D. Mich., 1959) 175 F.Supp. 390.

As a final reason why petitioner and its tug are not entitled to the asserted defenses, if indeed another reason be required, same is present in the fact that the *Corpus Christi case* is an "all fours" white horse case in which three different courts refused to hold for petitioner on these questions. Petitioner has certainly set forth no sound reason, and we respectfully submit that none exists, why the decisions in this matter should be changed after ten years of careful litigation, during the course of which all

of petitioner's arguments and authorities have been passed on in one form or another and found wanting. We respectfully submit that this Honorable Court should at this very late date find no reason to reconsider the facts and the authorities on these questions.

## CONCLUSION

In Appendix "C" hereto, for the convenience of this Honorable Court, is printed in full the statement of Captain H. E. Savoy of the Tug R. A. TURRENTINE given and signed by him on or about March 29, 1956, the day following the stranding and resultant dumping of cargo made the subject of this litigation. Such statement shows on its face, we respectfully submit, some very good reasons why, as a matter of fact and as a matter of law, Judge Hannay and the Fifth Circuit both held, and on rehearings adhered to such holding, that respondent should recover its damages in the case at bar. Today, more than ten years after the making of that statement, and after the principal questions of fact and law have been considered at least once, and more often twice, by each of six separately constituted Federal Courts, petitioner is still denying liability. The writ of this Court to further review this cause is not merited by the record, and therefore should be denied.

Respectfully submitted,

CARL G. STEARNS
E. V. GREENWOOD
*Attorneys for Respondent*

April, 1966

APPENDIX "A"

IN THE

# United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS,
CORPUS CHRISTI DIVISION

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AMERICAN HOME ASSURANCE COMPANY,
Libellant

vs.

TUG R. A. TURRENTINE, HER ENGINES, ETC.,
and BROWN & ROOT, INC.,
Respondents

vs.

MAGCO TOWING COMPANY, INC., MAGCOBAR,
INC., and MAGNET COVE BARIUM CORPORATION,
Impleaded Respondents

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A. D. 182

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EDMUND J. FORD JR.,
ROBERT T. RILEE II,
1517 Wilson Tower,
Corpus Christi, Texas
PROCTORS FOR LIBELLANT
and IMPLEADED RESPONDENTS

ROBERT EIKEL,
1910 Commerce Bldg.,
Houston 2, Texas,
PROCTOR FOR RESPONDENT
Brown & Root, Inc.

December 30, 1958

Libellant was the insurer of a cargo of drilling mud owned by Magcobar, Inc. (hereafter called Magcobar) and Magnet Cove Barium Corporation (hereafter called Magnet Cove). This cargo was lost while being transported from Brownsville, Texas, to Corpus Christi, Texas, on the barge LTC 6 which was under a bareboat charter to Magco Towing Company (hereafter called Magco Towing). Magco Towing had issued a "shipping order-short form bill of lading-memorandum" showing Magnet Cove as the shipper. Magcobar, Magnet Cove and Magco Towing are affiliated companies.

The loaded barge was being towed by the Tug R. A. Turrentine under a verbal contract of towage entered into some months before with Magco Towing whereby the tug was to tow the loaded barge from time to time for a given sum of money (in this instance $900). The barge was to be loaded by the employees of the Magco companies with cargo belonging to one or more of them and then towed by the Turrentine, in her exclusive custody and control. In this instance it had been so loaded by Magco Towing at Brownsville and pushed up the intercoastal canal and out into Corpus Christi Bay in the face of warnings of squally weather and rough wind and water. One of the cables holding the barge to the tugboat broke. The master of the tug cast off his pushing cables and connected to the barge in a towing position. In maneuvering the barge so as to regain its heading toward the city docks it listed and the cargo was lost.

Libellant, as insurer of the cargo, paid the loss and brought this proceeding claiming subrogation against the Tug Turrentine and its owners, alleging both unseaworthiness and negligence in a number of respects. Respondents

filed a petition under Admiralty Rule 56, impleading the Magco companies, alleging that under its agreement with Magco Towing the Tug "was simply to perform *towing services*, and the barge was to carry cargoes of the impleaded respondents, the tug having no responsibility except to *tow*, all responsibility with reference to the *loading, stowing and caring* for the cargo aboard the barge being the responsibility of impleaded respondents."[1] The Tug asked for decree against the impleaded respondents upon various grounds.

A pretrial hearing was held and an order entered reciting that the contract between Magco Towing and the Tug was for the *towing and transporting of the barge*, that Magco Towing was to load the barge and the Tug was to "furnish *towing services*." The issues to be tried were stipulated to be as follows:

(1) The negligence, if any, of the crew of the tug in *towing* of the barge or operation of the tug upon the voyage in question;

(2) The seaworthiness of the barge and its fitness to carry the cargo in question;

(3) The negligence, if any, of the agents and employees of MAGCO TOWING COMPANY, INC., in the loading of the cargo in question upon the barge;

(4) Whether such negligent acts or omissions, if any, and unseaworthiness, if any, proximately caused the loss sued upon;

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[1] Emphasis supplied throughout this memorandum unless otherwise indicated.

(5) The terms of the agreement for the *towing* of the barge, and the legal effect thereof; and

(6) The legal effect of the corporate status and relationship of Magnet Cove Barium Corporation, Magcobar, Inc., and Magco Towing Company, Inc.

Trial was had before the court and, after argument, a tentative finding of negligence upon the part of the Turrentine was announced from the bench but counsel were given time for the filing of briefs. The court now makes the following findings of fact:

(1) The Tug R. A. Turrentine was negligent in the following respects:

(A) The master was not sufficiently skilled to undertake the tow; (B) Free surface water was placed in the rake tanks of the barge in an improper manner, rendering the barge unseaworthy by reason of such negligence on the part of the crew; (C) In proceeding into Corpus Christi Bay under the existing conditions and continuing there instead of returning to, or seeking, sheltered water; (D) In making up the tow, after the breaking of the cable, so as to "tow" rather than continue to push the tow.

(2) Each and all of the foregoing acts of negligence was a proximate cause of the listing of the barge and the loss of its cargo.

(3) The barge was seaworthy and fit to carry the cargo which was properly loaded for the transportation to Corpus Christi had it not been for the negligence of the Tug and its crew which rendered the barge unseaworthy after it came under the exclusive control of the Tug; and

(4) The agents and employees of the Magco companies were not negligent in any respect in the loading of the barge and cargo.

Respondents' first defense is that there is no liability by reason of section 3 of the Harter Act (46 U.S.C.A. 192) which provides in substance that the owner of any vessel transporting merchandise or property, who exercises due diligence to make the vessel seaworthy and properly manned, etc., shall not be liable for loss resulting from faults or errors in navigation or management of the vessel. Section 3, however, applies to affreightment, not towing, contracts;[2] and, of course, standing alone, Respondents oral contract was one of *towing* only, as shown by the pleadings, the pretrial order and the facts emphasized above.

Respondents insist that this is a contract of affreightment, not of towing, pointing to (1) a provision in the pretrial order that "Any defense of the Respondents . . . to the claim of each of said corporations[3] as to American Home Assurance Company is a defense to its right by reason of subrogation"; (2) that Libellant sues as subrogee of the owner of the lost cargo; (3) that payment of the insurance was made to the owners of the cargo, Magnet Cove and Magcobar, not to Magco Towing; (4) that the suit here is basically one by the cargo owners against the carrier, Magco Towing, not upon the towing contract which respondents made with Magco Towing; (5) and that the shipping order-short form bill of lading-memorandum called for a Uniform Domestic Straight Bill

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[2] Mississippi Valley Barge Line Co. v. T. L. James & Co., Inc., (D.C. La.) 144 F. Supp. 662, affirmed, 5 Cir., 244 F.2d 263.

[3] The Magco affiliated companies.

of Lading,[4] all of which show a contract of affreightment. But all of these arguments cannot alter the fact that Respondents' contract was for *towing, not affreightment.* While ". . . a towage contract may be covered by the Harter Act where it actually is one of 'affreightment' rather than 'towage'—i.e., where the shipper simply places his cargo in the custody of the barge-owner, who proceeds to tow it to destination",[5] no such situation exists here. Respondents were careful to stipulate and emphasize in pleadings and oral argument that they did not contract to transport goods, or have anything to do with the cargo, but to *tow* a loaded barge. Indeed one of the principal points, strenuously argued but now not stressed, was that the cargo was improperly loaded, that Respondents' agents called attention to it but had an agreement that they were not to be liable. It is significant that the pre-trial stipulations and order did not name as one of the issues to be tried *the terms of the contract between the shippers and Magco Towing* but only "the terms of the agreement for the *towing* of the barge and the legal effect thereof".

In the cases cited by Respondents in which it was held that the contracts were for affreightment, not towage, there either was common ownership of the tug and the barge[6] or an ownership pro hac vice where the owner of

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[4] Reading in part as follows: ". . . that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (one) in official Southern, Western and Illinois freight classifications in effect on the date hereof, if this is a **rail** or a **rail-water** shipment, or (two) in the applicable motor carrier classification or tariff **if this is a motor carrier shipment**".

[5] Gilmore and Black "The Law of Admiralty", citing Sacramento Navigation Co. v. Salz, 273 U.S. 326.

[6] Sacramento Navigation Co. v. Salz, Supra.

the tug had the barge under a time charter and was entitled to receive the freight[7] or an arrangement between the tug and barge whereby they were to split the freight.[8] None of these factors are present in the case at bar.

Respondents' next contention is likewise contingent upon their right to the benefits of the shipping order-short form bill of lading-memorandum between Magnet Cove and Magco Towing which contained the provision that it should be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading, etc., set out in footnote 4, supra. This Uniform Domestic Straight Bill of Lading carries many "contract terms and conditions" in fine print on the back, among which is Sec. 2(c), providing that "Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, that the carrier reimburse the claimant for the premiums paid thereon".

Respondents contend (1) that since Magcobar and Magnet Cove, the shippers, had insurance on the cargo which Libellant paid off, therefore Magco towing had the right to benefit from such insurance;[9] that Respondents would have the right to set off such fact as a defense against Magco Towing and, therefore, may assert it against Libellant, subrogee of the affiliated companies; and (2),

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[7] The Vale Royal, (D.C., Md.) 51 F.Supp. 412, 1943 A.M.C. 1099.

[8] Towanda Iron Corp. v. The Marmor, (D.C., N.Y.), 56 F. Supp. 435, 1943 A.M.C. 1380.

[9] Citing 24-B Tex. Jr. 808, sec. 401; Missouri Pacific Ry. Co. v. International Marine Insurance Co., 84 Tex. 149 19 S.W. 459.

that if the policy contains a provision voiding it in the event of a provision whereby the carrier is to have the benefit of insurance, then Libellant was not liable to pay the insurance and, being a volunteer, may not recover.[10] But again, I think, Respondents may not benefit from these provisions, not being a party to the shipping order-short form bill of lading-memorandum. To permit Respondents to escape liability for their negligence under the circumstances existing here would be as unjust as to deny recovery in any other case where a party had insurance covering the loss.

Proctors for both Libellants and Respondents make many other contentions, but it is not necessary to discuss them in view of the foregoing, which are adopted as findings of fact and conclusions of law.

/s/ JAMES V. ALLRED

Wichita Falls, Texas. Judge

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[10] Citing Insurance Company of North America v. Easton, 73 Tex. 167, 11 S.W. 180, 3 L.R.A. 424.

## APPENDIX "B"

## AMENDED MEMORANDUM OPINION

(Filed Nov. 18, 1963)

(Caption Omitted)

After the Memorandum Opinion was filed herein, Mr. Robert Eikel, Proctor for Respondents, who had failed to file a brief in this case, requested permission that the Court refrain from acting upon his petition for rehearing until he could have a complete transcript of the testimony prepared and furnished the Court. This request was granted. Mr. Eikel then filed a brief on the merits of the case. The Court has carefully read the transcript of the testimony and studied the brief and the cases therein cited.

The Court hereby over-rules and denies the petition for a rehearing and makes the following changes in the original Memorandum Opinion, to-wit:

1. On page 1, the second word in the next to the last line, is changed from "obligated" to "subrogated";

2. On page 3, the second word in the last sentence of the first paragraph, is changed from "Libellant" to "Respondents";

3. On page 3, in the second line of the last paragraph, the words "necessary and reasonable" are inserted just before "cost of marine surveyor's fees".

Otherwise, the Memorandum Opinion heretofore filed remains unchanged.

Clerk will notify counsel.

/s/ ALLEN B. HANNAY
United States District Judge

## APPENDIX "C"

Statement of the Captain of the Steel Diesel Tug "R. A. Turrentine" in regard to grounding of Barge "LTC #6" appx. 20 miles north of Port Mansfield, Texas.

My name is H. E. Savoy. My address is Route 4, Box 240, Corpus Christi, Texas. I am married. I have been captain and worker on tugs for the past about four and a half years. I have been captain of the "R. A. Turrentine" for about a year and a half. I consider the "Turrentine" a good tug with plenty of horsepower for the work she does.

We arrived in Brownsville Shrimp Basin on March 25, 1956 about 5:30 p.m. and were loaded with about 900 tons of Magcobar both in hopper type cans and palette (sic) loaded paper bags.

The cans were loaded in three sections or groups forward, midships, and aft with the pallette set on each side of the center load and each pallette group stacked three high.

Carl Boyher (possibly mispelled (sic)) who is superintendant (sic) of Magco Towing Co. in charge of loading, told me the loading was satisfactory and to go to Ingleside, Texas to unload the cans and then to go to Port Lavaca, Texas and unload the pallettes.

We made up our tow on the LTC #6 with the stem of the tug on the rake of the barge and secured with 3/4" wire cable to each aft bitt of the barge and then ran single 5/8" wire cable to the aft bitts of the barge. Each cable was drawn ratchet tight.

We left the dock at 5 AM on the twenty eighth of March 1956 and headed down the channel reaching the Intracoastal Canal about 7:30 a. m.

About 8 PM that same nite (sic) I took the wheel releiving (sic) W. A. Lock, the mate.

The wind was blowing from the north about twenty five or thirty miles an hour and the nite (sic) was clear enough that I could make out the channel for about three miles and we were making about four miles an hour.

About 10:15 PM that nite (sic) the wind had shifted more to the northeast and as we passed the channel marker 620 mile and between markers #306 and #307 U. S. Engineers the barge #LTC #6 nosed close enough to the channel bank that she struck a sand bar on the left hand side (going north) and I gave her a hard right rudder to try and slide off.

The barge then heeled over more to starboard and the cans started shifting after I immediately reversed the engine to try and back off but she went over further to starboard to about a forty five degree angle and the cans & palletes (sic) started sliding off the starboard side.

The tug heeled over to starboard also and one bow cable snapped.

I would say that about 90% of the cargo went overboard along with a Clark fork truck and a 2" Briggs & Stratton pump.

I decided not to move the barge in case we lost more cargo. We have layed (sic) here since we notified the R. M. Davis, Brown & Root marine supt. in Corpus Christi Texas by radio. He told me to standby and assist any tows to clear us that might pass by and that he would have a salvage crew down as soon as possible.

I believe this casualty occured (sic) because there were insufficient channel lites (sic) to help me keep in the center of the channel.

We, I believe, wouldn't have lost any of our load if the hopper cans had not shifted across the deck to starboard since they were not lashed down or blocked off in any way.

This is all I know.

/s/ H. E. SAVOY
H. E. Savoy, Captain
of Tug "R. A. Turrentine"

We have read the above statement and it is true and correct and complete to the best of our knowledge.

/s/ W. A. LOCK
W. A. Lock
Mate of "R. A. Turrentine"

/s/ ALCIDE TOUCHETTE
Alcide Touchette
Deck hand of
"R. A. Turrentine"